CHUA SOONG KOW & ANAK-ANAK SDN. BHD.

v.

SYKT. SOONG HENG

HIGH COURT MALAYA, KUANTAN
SHAIK DAUD ISMAIL J
[CIVIL SUIT NO. 18 OF 1983]
1 MARCH 1984

CONTRACT: *Sub-contract - Balance due for work done - Counter-claim - Indemnity - Loss arising from damage - Whether term could be implied - Business efficacy - Custom - Conduct - Obligation under another contract - Damage - Whether plaintiff solely liable.*

CIVIL PROCEDURE: *Oral application to amend statement of defence - Whether should be allowed - Effect if allowed - Variation of written contract.*

EVIDENCE: *Evidence of an oral undertaking - Whether should be allowed to be adduced - Evidence Act 1950, s. 92.*

The plaintiff claimed for the sum of RM42,586 being the balance due for work done in respect of a sub-contract between the plaintiff and the defendant regarding a project relating to the construction of an embankment and laterite road at Pahang Tua, Pekan. The defendant was the main contractor of Jabatan Parit & Taliair for the construction of concrete canals at Pekan. They averred that they were not liable as it was an implied term of the sub-contract that the plaintiff would be liable to pay or indemnify the defendant for any liability or loss arising out of the execution of the work by the plaintiff. They claimed that the plaintiff, in carrying out the works under the sub-contract, had damaged the road leading to the site, resulting in the defendant being fined RM43,000 by the Jabatan Kerja Raya. They counterclaimed for RM43,000. At the hearing of the action, the defendant made an oral application to amend the statement of defence to add the words "and/or express term" after the words "implied term".

Held:

[1] The application to amend the statement of defence must be disallowed. Otherwise it would tantamount to adding a new term to the agreement and thereby prejudicing the plaintiff. What the defendant sought to do was to introduce evidence to vary the term of a written contract and this was strictly forbidden by s. 92 of the Evidence Act 1950.

[2] The defence should not be allowed to adduce evidence of an oral undertaking on the part of the plaintiff to indemnify the defendant. The Court would consider the defence as pleaded. It is a well-established principle of law that a case must be decided on the issues raised by the pleadings which bind the parties.

[3] The Court would not imply a term into the sub-contract that the plaintiff would be liable to indemnify the defendant.

(a) In the circumstances of the case, an undertaking to repair a public road and put it back in its original condition was a most unreasonable term to be implied. Whether or not a term is implied is usually gathered from the agreement itself and the surrounding circumstances. A term will generally be implied if it is necessary to give efficacy to the contract or if it was so obviously a stipulation in the agreement that it was idle to express it by specific words.

(b) Further, in the absence of sufficient evidence, regarding the notoriety of such a custom the Court was in no position to take the judicial notice of any custom or common practice to imply such a term. A custom or usage to be considered by the Court must be reasonable, certain and notorious.

(c) Neither could the Court imply the term to indemnify the defendant from the conduct of the plaintiff.

(d) The plaintiff's obligation to repair under an agreement to repair with the State Government could not be construed to imply a term under the sub-contract. The Court was concerned only with the sub-contract between the plaintiff and the defendant.

[4] Finally, on a balance of probabilities, there was no proof that the plaintiff's vehicles were solely responsible for the damage to the road.

[Claim allowed. Counterclaim dismissed.]

Cases referred to:
Tindok Besar Estate Sdn. Bhd. v. Tinjar Co. [1979] 2 MLJ 229
Esso Petroleum Co. Ltd. v. Southport Corp. [1956] AC 218
Chartered Bank v. Yong Chan [1974] 1 MLJ 157

Other Source referred to:
Chitty On Contract 25th Edn. para. 847 p. 454

For the plaintiff - Andrew Wong; M/s. Ten Appaduray & Wong
For the defendant - R. Thomas; M/s. Loke Chew & Zainal

JUDGMENT

Shaik Daud Ismail J:

This is a claim by the plaintiff against the defendant for the sum of RM42,586 being the balance due for work done. A director of the plaintiff, Chua Chin Hean (PW1) in his evidence states that sometime in March 1982, his company at the request of the defendant, provided a quotation for a project relating to the construction of an embankment and laterite road at Pahang Tua, Pekan. This quotation is contained in a letter dated 3 April 1982 addressed to the plaintiff (P2). As agreed plaintiff started work sometime in June 1982 and completed it in August of the same year. The total value of the work done by plaintiff was RM172,586 and accordingly plaintiff sent an invoice dated 11 September 1982 for the amount to the defendant (P3). Out of this sum a balance of RM42,586 is due to the plaintiff. The defendant, while admitting that this amount is due to the plaintiff in respect of the sub-contract between the plaintiff and the defendant, avers that they are not liable to pay the amount or any sum at all because it was an implied term of the sub-contract that the plaintiff would be liable to pay and or indemnify the defendant for any liability, loss claim or whatever injures arising out of or caused by the execution of the works of the plaintiff. The defendant who is the main contractor of Jabatan Parit & Taliair for the construction of concrete canals at Pekan, avers that the plaintiff in carrying out the works under the sub-contract, damaged the road leading to the site resulting in the Jabatan Kerja Raya imposing a fine on the defendant of RM43,000. Consequently, the Jabatan Parit & Taliair deducted this amount from their payments to defendant. He now counterclaims against the plaintiff for the sum of RM43,000.

In carrying out the sub-contract plaintiff had to take earth and rock material from a place called Ganchong and transport same to the site at Pahang Tua in Pekan, a distance of about 11 miles. Plaintiff contends that when he first started transporting, the Ganchong/Pahang Tua road was already in a bad state with large pot holes all along the road. At times his workers had even to use the earth and rock material they were transporting, to do some temporary patching of the pot holes to enable his vehicles to use the road properly. It is common ground that this particular road is a public road used by other vehicles including public transport vehicles and lorries belonging to the Jabatan Kerja Raya and Jabatan Parit & Taliair. While conceding that his lorries could have contributed to the damage to the road, plaintiff states that as it is a public road and being used by all and sundry, he alone should not be blamed for the damage to the road. The plaintiff contends that the defendant is withholding the payment of RM42,586.60 due to him because the authorities had deducted the RM43,000 from defendant.

In order to support the contention that this road is a public road the plaintiff called two witnesses. One is Nazri b. Yusoff who was, in 1982, engaged in transporting and who frequently used the same road, testifies that during that period this road was in a bad state and that it was being used by all other vehicles including heavy vehicles. Nazri in cross-examination openly admits that his lorries were overloaded. The second witness, Chan Ah Chai, who was engaged by defendant to transport sand and stones for another project also at Pahang Tua, confirmed that this road was in a bad state and that being a public road was being used by all types of other vehicles. He too openly admitted that his vehicles were overloaded.

The defendant testifies that before the plaintiff's quotation was accepted he had a meeting with plaintiff at which meeting plaintiff was alleged to have given an undertaking to be responsible for any damage to the road as a result of carrying out the sub-contract. This, the plaintiff has categorically denied, and says that if there had been such an undertaking defendant would have included same in their letter of acceptance. I will pause at this stage to say that there is nowhere mentioned in either P1, P2 or in all the correspondences between the plaintiff and the defendant of this alleged oral undertaking by the plaintiff. I would have thought that the defendant being a long standing and reputable company, would have been prudent enough to have mentioned this alleged oral undertaking in either the letter of acceptance P2 or any of the other letters addressed to the plaintiff. When the defendant first communicated to the plaintiff by letter dated 16 August 1982 (see D5) requesting the plaintiff to repair the damage, it was never mentioned that plaintiff had to do this as earlier agreed upon or as earlier undertaken. In any case this was never pleaded in the statement of defence.

After the defendant had completed his evidence and the case adjourned and when it came up for continuation the following day, learned Counsel for the defence makes an oral application to amend para. 4 of the statement of defence to add the words, "and/or express term" after the words "implied term". After hearing a short argument, I disallowed the application as I feel that it would tantamount to adding a new term to the agreement and would thereby prejudice the plaintiff. In any case, what the defence sought to do is to introduce evidence to contradict, vary, add to or subtract from any terms of a contract in writing and this is strictly forbidden by s. 92 of the Evidence Act 1950. See *Tindok Besar Estate Sdn. Bhd. v. Tinjar Co.* [1979] 2 MLJ 229.

As mentioned earlier, since the defence did not plead that the plaintiff had earlier given an oral undertaking but nevertheless the defence adduced evidence of this. In the circumstances, should the Court even consider this evidence. It is a well-established principle of law that a case must be decided on the issues raised by the pleadings which bind the parties. The reason for this must be obvious and it is to give fair notice of the case which is to be made out so that the other party may direct his evidence to the issues disclosed by them. In other words, to prevent an element of surprise. See *Esso Petroleum Co. Ltd. v. Southport Corp.* [1956] AC 218, 238 and *Chartered Bank v. Yong Chan* [1974] 1 MLJ 157. The issue of the oral undertaking allegedly given by the plaintiff is within the knowledge of the defendant long before the plaintiff issued the writ and since this specific defence was never pleaded, it is my judgement that defence should not be allowed to adduce evidence on them. Since it has been adduced the Court will not consider it. In the circumstances, the Court is left to consider as pleaded, whether it is an implied term of the sub-contract entered into between the plaintiff and the defendant that the plaintiff would be liable to pay and or indemnify the defendant.

Whether or not a term is implied is usually gathered from the intention of the parties as can be found from the agreement itself and the surrounding circumstances. A term will generally be implied if it is necessary, in the business sense, to give efficacy to the contract but even if a particular term is not necessary to give efficacy to the contract, it may nevertheless be implied if it was so obviously a stipulation in the agreement that it was idle to express it by specific words.

Looking at the sub-contract between plaintiff and defendant, can it be said that the term is necessary, in the business sense, to give efficacy to the contract. The answer must be in the negative. Further is such a term so obviously a stipulation in the agreement that it was idle to express it by specific words. The answer must again be in the negative. Before the Court can imply a term in the contract such as the one alleged by the defendant the Court has to consider reasonableness and precision. This is discussed in *Chitty On Contract* 25th Edn. para. 847 p. 454:

> A term ought not to be implied unless it is in all circumstances reasonable. But this does not mean that a term will be implied merely because in all circumstances it would be reasonable to do so or because it would improve the contract or make its carrying out more convenient. The touch-stone is always necessity and not merely reasonableness. The term to be implied must also be capable of being formulated with sufficient precision.

In the circumstances of this case I hold that an undertaking to repair a public road and putting it back in its original condition is a most unreasonable term to be implied simply because of the enormous costs involved. PW1's evidence of the cost to put the road back to its original condition would run into millions whereas his sub-contract with defendant was a small sum of over one hundred thousand ringgit.

It was urged by the defence that such a condition can be implied from usage and custom or common practice, and urges the Court to take judicial notice of them. A custom or usage to be good, and to be considered by the Court, must be reasonable, certain and notorious. The notoriety of a custom or usage is a matter to be proved by evidence. In the present case the evidence which the Court is asked to rely upon is the bare and general statement by DW1 "that it is a common practice among Chinese businessmen" I find it as a fact that this bare and general statement by itself is no proof of the notoriety of the custom or usage. Since no other evidence is called upon by the defendant to prove this the Court is in no position to take judicial notice of it. The defendant also urged the Court to imply the term on the basis

of the conduct of the plaintiff in that when requested by defendant, plaintiff without protest did some repair at his own expense. PW1 states in evidence that defendant is withholding money due to him and as a businessman he would rather spend some money, in this case he spent RM8,000, in order to get his RM42,000. It is in evidence that after plaintiff had done some patching up of the road defendant released a further sum of RM10,000. To my mind this displays the business acumen of the plaintiff and in no way could it be construed that his conduct amounted to an express or implied undertaking.

Learned Counsel for the defence submits that there is a contractual liability on the part of the plaintiff as regards damages to the road. In connection with this she refers to the agreement which plaintiff entered into with the State Government of Pahang in order to obtain permission to enter into an area in Ganchong to extract and remove rock materials. In that agreement (on p. 3 of the defendant's bundle of documents) there is a clause whereby plaintiff would have to bear all responsibilities for any damage to property. In the circumstances of this case I am of the view that in order to construe whether there was such an implied term, I should not be concerned with the agreement between the plaintiff and the State Government of Pahang. In the first place that agreement had nothing to do with the sub-contract between the plaintiff and the defendant and in the second place the defendant is not privy to that agreement. Lastly neither the State Government of Pahang nor its agents had penalised plaintiff for breach of that agreement. The Court is only concerned with the sub-contract between the plaintiff and the defendant. Plaintiff's obligation under that agreement cannot be construed to imply a term under the sub-contract.

On a balance of probabilities there is no proof that the plaintiff's vehicles were solely responsible for the damage to the road. DW1's own testimony that it was unfair to blame plaintiff solely for the damage confirms this. As plaintiff himself has conceded that his vehicles had contributed to the damage he is partly to be responsible and for this I am of the view he has adequately been penalised by doing some repair at his own expense.

In the event I allow the plaintiff's claim as prayed and dismiss the defendant's counterclaim with costs.

Also found at [1984] 1 CLJ 364